No. 1051 (31)

IN THE

Supreme Court of the United States

THE MORRIS PLAN INDUSTRIAL BANK
OF NEW YORK,

Petitioner,

—against—

HENRY H. RAPHIEL,

Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

JOHN L. GRANT,
Attorney for the Respondent.

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No. 1051—October Term, 1944

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BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Application is made by Petitioner for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, which reversed, on Respondent's appeal, an order denying Respondent's discharge in bankruptcy.

Statement of the Case

On November 14, 1928, an involuntary petition in bankruptcy was filed against Respondent and one Samuel Raphiel; thereafter Respondent was duly adjudicated Bankrupt (R. 2), but no application for discharge from his then existing indebtedness was made by Respondent (R. 10).

On February 4, 1929 an indictment was filed in the United States District Court, Southern District of New York, against Respondent for unlawfully, wilfully, knowingly, and fraudulently concealing from his then Trustee in Bankruptcy, merchandise and moneys amounting to approximately $25,000, and for destroying documents relating to his affairs

as said Bankrupt (R. 2), to which indictment he pleaded guilty and was sentenced to six months' imprisonment (R. 3).

Thereafter and on November 23, 1943, a voluntary petition in bankruptcy was filed by Respondent, and on said day an order of adjudication was entered (R. 9).

Set forth in the schedules filed by the Respondent on November 23, 1943, were debts owing by him to creditors whose debts were incurred at the time of the prior bankruptcy (R. 9), as well as a number of new indebtednesses that the Respondent had incurred not less than five years after the previous petition was filed against him (R. 10).

Thereafter an order was made in the present proceeding, fixing February 9, 1944 as the last day for the filing of objections to the Respondent's discharge (R. 9); and on April 13, 1944 a hearing upon the objections filed by the Morris Plan Industrial Bank of New York, whose debt was incurred by Respondent in 1933, came on for hearing before the Referee (R. 4, 5, 6), on which hearing it was conceded by the Respondent that the matters set forth in the specifications of objection to his discharge were in all respects true (R. 5). A motion was then made for a discharge of the Respondent from all his indebtednesses except those that were involved in the prior bankruptcy proceeding (R. 5).

Thereafter the Referee denied a discharge to the Bankrupt not only from the debts involved in the first bankruptcy proceeding, but also from the new indebtednesses that he had incurred from 1933 down to the filing of the second petition in 1943 (R. 7, 8).

Thereafter this matter came on to be heard before the District Court, upon a petition to review, and the order of the Referee was affirmed (R. 14, 15, 16).

On appeal to the United States Circuit Court of Appeals for the Second Circuit, the order of the District Court was reversed, and said Circuit Court directed that the Respondent be discharged from all debts, except those involved in the prior bankruptcy proceeding (R. 20, 21, 22, 23).

Argument

Point I.

The Petitioner seeks to review the decision of the Circuit Court, reversing the determination of the District Court, on the ground that such decision holds, in effect, that to preclude a discharge the Bankrupt must commit the bankruptcy offense in his own bankruptcy proceeding and not in some other proceeding, and also in effect it holds that the denial of a discharge because of an offense committed by the Bankrupt in his own bankruptcy, in violation of the Bankruptcy Act, does not preclude a discharge in any subsequent proceeding, but only from a discharge from the debts in existence at the time the offense was committed.

Neither in the case of *In re Lesser*, 234 Fed. 65, nor in any of the other cases cited by Petitioner, was it held that an offense committed by the Bankrupt in a proceeding not his own, precluded the Bankrupt for all time from a discharge in any subsequent bankruptcy proceedings. This decision was in effect followed by all the other cases cited by Petitioner, and they simply hold that it is not necessary for the bankruptcy offense to have been committed in the Bankrupt's own bankruptcy proceeding in order to preclude him from a discharge from his then debts, and the decision of the Circuit Court has now reversed itself on that proposition and holds that the bankruptcy offense must be committed in the Bankrupt's own proceeding. However, this is beside the question, so far as this proceeding is concerned, since the offense committed by the Respondent in 1928, in violation of the provisions of the Bankruptcy Act, precluded him from obtaining a discharge in the prior proceeding, and such offense was committed in his own proceeding, and it was contended by Respondent in the Court below that while such offense precluded his discharge in the prior proceeding, it did not preclude his discharge in a subsequent proceeding, nor preclude him from a discharge for all time.

The Circuit Court, in its opinion (R. 22), distinctly held that the doctrine adopted by the District Court did prevent the discharge in bankruptcy as to all creditors for all time, and that nothing in the Act so provides, and there is nothing in the legislative history to justify it. The Act itself provides that a petition may be filed after the expiration of six years from a prior discharge, and surely if the bankrupt committed a bankruptcy offense, it would only preclude him from a discharge from his then creditors, and if Congress intended otherwise, namely that it should preclude him from a discharge in bankruptcy for all time, it would clearly have so stated in the Act.

As heretofore stated, none of the cases cited by Petitioner is authority in support of this proposition, as there is no holding that because of the commission of a bankruptcy offense by a bankrupt, either in his own or in some other bankruptcy proceeding, it will preclude a discharge in a subsequent proceeding from debts incurred many years after the first proceeding. The Circuit Court, in this respect, so held, and this holding is not in conflict with any other decision in any other Circuit. In addition, the holding by the Circuit Court that the bankruptcy offense must be committed in the Bankrupt's own proceeding was held, in the case of *In re Blalock,* 118 Fed. 679, and now the Second Circuit, in the proceeding at bar, has finally determined to follow that decision, and therefore the decision now made by the Circuit Court, in overruling its previous decision in *In re Lesser, supra,* is not in conflict with the decision of any other circuit, as the other cases cited by Petitioner simply followed this decision.

In the proceeding at bar, the Respondent contends that the commission of a bankruptcy offense in 1928, which was an offense committed in his own bankruptcy proceeding, would preclude him from a discharge from the debts of his then creditors, but would not preclude him for all time from a discharge in any subsequent proceedings, and none of the cases cited by Petitioner, hold to the contrary, and under these circumstances certiorari should be refused.

Point II.

The Respondent herein was entitled in the bankruptcy proceeding filed in November, 1943, to a qualified discharge, namely a discharge from all his provable debts scheduled in that proceeding and which were not included in and not in existence at the time of the bankruptcy proceeding in 1928.

As aforesaid, it was conceded by Respondent that he had unlawfully, wilfully, knowingly, and fraudulently concealed from his Trustee in Bankruptcy merchandise and money amounting to approximately $25,000, and destroyed documents relating to his affairs in that proceeding, and that an indictment was filed in the District Court on February 4, 1929, charging him with the offenses aforementioned, and that he pleaded guilty thereto and was sentenced to six months in prison therefor.

The Petitioner, The Morris Plan Industrial Bank of New York, was not a creditor of the Bankrupt at the time of the prior bankruptcy proceeding, the indebtedness owing to this creditor having been incurred by the Bankrupt, as shown by the schedules in bankruptcy, in or about the year 1933, approximately five years after the former bankruptcy proceeding was commenced. The voluntary petition in bankruptcy in this proceeding was filed on November 23, 1943, approximately fifteen years after the first proceeding, and all the new debts scheduled in the present proceeding were incurred between the years 1933 and 1943, many years after the prior bankruptcy proceeding, and many years after the matters alleged in the indictment occurred.

The contention made by Petitioner that the Respondent, in connection with the former proceeding, concealed assets and destroyed documents relating to his then affairs, constitute grounds to perpetually deny a discharge to him in any bankruptcy proceeding subsequent to the 1928 proceeding, and involving debts incurred thereafter and not in-

cluded in the former proceeding, is definitely untenable.

The District Court, in affirming the Referee's order denying a discharge, erroneously held that since the Respondent had committed an offense under the Bankruptcy Act, Section 14, subdivision (c) (1), which is punishable by imprisonment, that this fact differentiates it from the adjudicated cases and thereby prevents the Respondent forever from obtaining a discharge not only from debts incurred at the time the imprisonment occurred but also from any debts thereafter incurred.

The Bankruptcy Act specifically provides, Section 14, subdivision (c) (5), that after a six-year period, a person may again avail himself of the beneficent provisions of the Bankruptcy Act.

In the case of *Chopnick* v. *Tokatyan*, 128 F. (2d) 521, it was held:

> "Even without that provision (subd. a, Sect. 11) we believe that the principle of res judicata should lead to the same conclusion. Denial of a discharge from provable debts, or failure to apply for it within the statutory period, bars an application in a subsequent bankruptcy proceeding for discharge from the same debts. Freshman x. Atkins, 269 U.S. 121, 70 L. ed. 193, 46 S. Ct. 41, 6 A.B.R. (N.S.) 744; In re Schwartz, 2 Cir., 89 F. (2d) 172, 33 A.B.R. (N.S.) 674; In re Summer, 2 Cir. 107 F. (2d) 396, 41 A.B.R. (N.S.) 246; Perlman v. 322 West Seventy-second Street Co., 2 Cir. April 11, 1942, 127 F. (2d) 716, 49 A.B.R. (N.S.) 212. We think this equally true whether denial of the discharge was because of a previous discharge within six years, as in the case at bar, or on some other ground specified in Sect. 14. In re McCausland, D.C.S.D. Cal. 9 F. Supp. 129, 26 A.B.R. (N.S.) 735, appeal dismissed in McCausland v. International Shoe Co., 9 Cir. 79 F. (2d) 1001."

This decision definitely holds that even though the discharge in the first proceeding was upon any ground specified in Section 14, such a denial prevents a discharge from the same debts in a subsequent bankruptcy proceeding.

The Respondent concedes, of course, that he is not entitled to a discharge from the provable debts in the 1928 proceeding, since he failed to apply for a discharge within the statutory period, and he is therefore barred in this proceeding from a discharge from these same debts, and it was so held in the above quoted case. All the Respondent sought to obtain in this proceeding was a discharge from the new debts incurred in and between the years 1933 and 1943, with the debts existing at the time of the prior bankruptcy proceeding excepted. Such a qualified discharge may be granted in a second bankruptcy.

See:

In re Early, 34 F. Supp. 774, 43 A.B.R. (N.S.) 518.

Under the law prior to 1938, there was a definite time limit within which a bankrupt had to make application for a discharge. While an extension was permitted, if the time finally elapsed without application, a discharge could not be obtained. The Act of 1938 now makes a petition constitute an automatic application for a discharge. It frequently happens that petitions are dismissed because of the failure of the bankrupt to deposit the necessary funds to enable the Referee to send out notices. Such dismissal, in effect, is a denial of a discharge on the debts which were listed in the proceeding, and the effect of dismissal is the same as failure to apply for a discharge within the statutory period. After such a dismissal the Bankrupt cannot obtain a discharge of debts listed in the petition in a subsequent proceeding.

In re Sheff, 44 F. Supp. 795, 51 A.B.R. (N.S.) 42. This case is also authority for the proposition that a bankrupt may be entitled to a discharge from new debts, but not to a discharge from old debts which were listed in a prior proceeding in which a discharge was not granted, and if a discharge is granted in respect of the new debts, it should specify with particularity, the items from which the debtor is not to be discharged.

See also:

Hisey v. *Lewis-Gale Hospital*, 27 F. Supp. 20, 40 A. B. R. (N. S.) 206;
In re Bacon, 193 F. 34;
Pollet v. *Cosel*, 179 F. 488.

This entire subject was fully discussed in the case of *In re Zeiler*, 18 Fed. Supp. 538.

In the case of *Blumenthal* v. *Jones*, 208 U. S. 64, it was held as follows:

> "Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all times and in all courts, between those parties or privies to it, the facts upon which the refusal is based."

The courts have never held that the acts committed by a bankrupt in the first proceeding can be availed of by any creditors concerning debts subsequently incurred by the bankrupt when application for discharge is made in a subsequent proceeding. From the above citations of authority it is perfectly apparent that only the creditors who were concerned with the prior proceeding can avail themselves of the claim of *res judicata*, so far as a discharge from their debts in the second proceeding is concerned, but certainly

the new creditors scheduled in the subsequent proceeding, cannot avail themselves of any act of the bankrupt that would have prevented a discharge from his provable debts in the prior proceeding.

As was said in the case of

> *Prudential Loan & Finance Co. v. Robarts*, 52 F. (2d) 918:
>
> "The refusal of a discharge because of a prior discharge within six years stands on a different footing from a refusal on any other ground. The other grounds all involve reprehensible conduct of the bankrupt, which Congress intended to punish by perpetual refusal to discharge him from the claims of his then creditors."

This case is direct authority for the proposition that no matter what reprehensible conduct this Respondent was guilty of in the prior proceeding, it does not prevent a discharge from his new debts in this proceeding, but does perpetually prevent a discharge from the debts included in the prior proceeding, that is from the claims of his then creditors. It appears that the acts committed by the Respondent in the former proceeding, no matter how reprehensible, cannot be used as a bar to his discharge, in the present proceeding, except upon a plea of *res judicata;* that is, the old creditors have the right to come in and say that they were parties to the former proceeding, and therefore all matters determined in the former proceeding are *res judicata* in the subsequent proceeding, so far as their debts are concerned. But the new creditors cannot come in and claim that the acts committed by the Respondent in the former proceeding, in violation of the provisions of Section 14, are now available to them as a perpetual bar to his discharge from his new debts, and no case so holds.

It does not make a particle of difference what acts the Respondent committed in violation of Section 14 (c) of the Bankruptcy Act, or whether the Respondent suffered imprisonment. He is entitled to his discharge in this proceeding from the new debts involved in this proceeding. Any of such acts do not prevent a perpetual discharge, except so far as the debts included in the prior proceeding are concerned, and all the authorities so hold, namely that the denial of a discharge affects the then existing debts, but does not prevent a discharge from those subsequently incurred by the bankrupt and which are included in a new bankruptcy proceeding.

The cases cited by the Referee in his opinion (R. 7), and by the District Court (R. 14, 15), are definitely not in point, and are in no way decisive of the question here involved.

The case *In re Lesser, supra*, held that it was the intention of the law makers to refuse a discharge to a bankrupt who has taken a false oath in any bankruptcy proceeding, and that the contention that the perjury must be committed in his own bankruptcy proceeding is contrary to the letter of the law. The bankrupt had made false oaths in a proceeding in bankruptcy other than his own, and it was held that even though the false oath had been made in a different bankruptcy proceeding from the one at bar, this was sufficient to refuse a discharge to the bankrupt and that is all that case held. It did not hold that thereafter the bankrupt would be forever precluded from a discharge in any subsequent proceeding in bankruptcy, concerning new debts incurred and not included in the prior proceeding. That question was not before the Court in that case, and was certainly not authority for the denial of a discharge to this Respondent, so far as the new debts included in this subsequent proceeding were concerned.

The second case cited is in *Re Sieben*, 89 Fed. (2d) 935. This, likewise, is not an authority in support of the objecting creditor's contention. This case simply follows the

reasoning of the *Lesser* case aforementioned, and holds that perjury in relation to any proceeding in bankruptcy subjects the perjurer to criminal prosecution, and bars his discharge in any subsequent proceeding of his own. This determination unquestionably, under the decisions, would be *res judicata*, as between the then existing creditors and the Respondent, but certainly does not hold that the denial of a discharge in this proceeding would prevent a discharge of the Respondent in a subsequent proceeding, years later, concerning new indebtednesses incurred by the Respondent long after the prior proceeding.

The third case cited is that of *Re Gophrener*, 20 Fed. Supp. 922. This likewise followed the reasoning in the *Lesser* case. The bankrupt and others had conspired to conceal from the Trustee in Bankruptcy in another case, and the Bankrupt was convicted and sentenced. The District Court held that the bankrupt was not entitled to a discharge, which is a matter of favor. The fact that the concealment occurred in another bankruptcy proceeding did not aid the bankrupt.

The Court distinctly held that a concealment in another bankruptcy case was a violation of the Bankruptcy Act, Section 14 (c), but again the observation is made that the Court in no wise held that this would perpetually prevent a discharge to the bankrupt in any subsequent proceeding, involving new debts incurred a reasonable time thereafter.

See:

Re Kuffler, 93 C. C. A. 671, 168 Fed. 1021 (2d Circuit).

Conclusion

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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